Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-14

LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - Appellant,

versus

Z. D. ATKINS,
ROBERT CLEMENT, and
CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County, Tennessee; and
DICKSON COUNTY, TENNESSEE - Appellees.

On Appeal from the United States District Court for the Middle District of Tennessee Nashville Division

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

(See inside cover for list of attorneys)

August 16, 1975

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-14

LOUISVILLE AND NASHVILLE RAILROAD COMPANY - - - - - - - *Appellant,*

v.

Z. D. ATKINS,
ROBERT CLEMENT, and
CAYCE PENTECOST, Commissioners composing the Tennessee Public Service Commission;
HONORABLE RAY BLANTON, Governor of the State of Tennessee;
HONORABLE JOE C. CARR, Secretary of State of the State of Tennessee;
HONORABLE RANDOLPH A. ASHLEY, JR., Attorney General of the State of Tennessee;
ALICE T. STEELE, Trustee of Dickson County Tennessee; and
DICKSON COUNTY, TENNESSEE - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the United States Supreme Court, Appellant submits this brief in opposition to Appellees' Motion to Affirm the Judg-

ment of the United States District Court for the Middle District of Tennessee, the ground for said Motion being that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

THE QUESTIONS ARE SUBSTANTIAL

Appellant presented three questions to the Court. In paraphase they are:

1. Does the evidence establish that the classification action of the Tennessee General Assembly was arbitrary, capricious and unreasonable?

2. Did the District Court comply with Rule 52(a) of the Federal Rules of Civil Procedure?

3. Did the District Court take an unduly limited view of its jurisdiction to review the action of the Tennessee General Assembly?

Appellant's Motion to Affirm is directed only to the first of the foregoing questions. Accordingly, this Brief will be similarly limited, without abandonment of the other questions.

In support of their argument, Appellees cite authorities recognizing the right of a state legislature to establish classifications. They suggest that the discretion possessed by the legislature in such a process is without limitation and that there may be no substitution of judicial judgment for legislative judgment in reviewing state tax classifications.

Adherence to such a position would foreclose the courts from examining legislative action or giving any remedy for it in case of an arbitrary or capricious exercise of legislative power. But this is exactly the authority which rests in the courts, for they are the traditional protection against arbitrary and capricious exercise of power by the legislature. Appellant seeks, at this time in this case, only the plenary consideration of this Court, with briefs on the merits and oral argument, so that what Appellant believes to be a new question in modern times may be presented in that manner to this Court.

In the context of jurisdiction, the Supreme Court has said that questions are unsubstantial only when they are obviously without merit or of such a nature that their "unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hagans* v. *Lavine,* 415 U. S. 528 (1974) at 536-7. Those standards are equally instructive here.

Clearly there is merit in Appellant's claim that the legislative action was arbitrary and capricious—much evidence was introduced to support that claim and the lower court accepted jurisdiction, recognizing a substantial federal question to be present. Previous decisions are not governing because, to the best of Appellant's research, no case since *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, decided in 1938 (and involving a different factual situation), has pre-

sented the Court with the question whether, *as a matter of fact,* a given legislative action in classifying railroads with public utilities for purposes of ad valorem taxation was arbitrary and capricious, and no case has presented the question of whether, given the classification structure established by the legislature and given the characteristics of railroads in modern-day society, it was arbitrary and capricious to classify railroads as other than commercial and industrial property, one of the classifications in the scheme. Granting of the Motion to Affirm will be construed by some to mean that a legislature may act without restraint in classifying railroads for purposes of ad valorem taxation. Appellant does not understand this to be the law.

Unlike most of the cases which come to this Court, there has been consideration of the facts and of Appellant's arguments on the facts in only one forum, namely, that of the District Court. This is because the assessing authority considered itself precluded by the Tennessee statute from the exercise of any discretion, based upon the facts, as to the appropriate classification of railroads. A member of the assessing body testified that "we would have no discretion insofar as our treatment of it is concerned" (III Tr. 154-155). Thus, no evidence on appropriate classification was introduced before the assessing body and the only evidence in the case is that which was taken in the District Court proceeding. There has thus far, therefore,

been no review of the facts or of the conclusion reached on those facts by the only forum hearing them.

The result is that if plenary consideration is not granted by this Court, a subject of national significance and impact (please see Jurisdictional Statement, pages 10-11) will have been fully considered only once and then only on the briefs, for oral argument was not granted in the District Court.

Not even *Apache County* v. *Atchison, T. & S. F. Ry. Co.*, 106 Ariz. 856, 476, P. 2d 657 (1970), appeal dismissed 401 U. S. 1005, cited by Appellees in their Motion to Affirm, should foreclose plenary consideration. The taxpayers there sought, against the background of quite a different statute, to be classified with public service corporations rather than as a totally separate category. Appellant in this case alleges its practical identity with other forms of commercial and industrial enterprise rather than with public service corporations, and appears in the context of a markedly different classification scheme, one which renders the legislative action as to Appellant arbitrary and capricious.

CONCLUSION

For the foregoing reasons, as well as because of its arguments in respect of the second and third questions presented in the Jurisdictional Statement, Appellant prays for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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PROOF OF SERVICE

I, Philip M. Lanier, one of the attorneys for Louisville and Nashville Railroad Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of August, 1975, I served copies of the foregoing Brief in Opposition to Motion to Affirm in the Supreme Court of the United States on the several parties thereto, as follows:

On Messrs. Z. D. Atkins, Robert Clement, Cayce Pentecost, Ray Blanton, Joe C. Carr, and Randolph A. Ashley, Jr., by mailing 3 copies thereof to Everett H. Falk, Esquire, at 208 Supreme Court Building, Nashville, Tennessee, all in duly addressed envelopes with first-class postage prepaid; and upon Alice T. Steele and Dickson County, Tennessee, by mailing 3 copies, in a duly addressed envelope, with first-class postage prepaid, to Ray Stuart, Esquire, Dickson, Tennessee 37055. Further such service constitutes service upon all parties required to be served.

This 16th day of August, 1975.

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Philip M. Lanier